

THE EXTENT OF THE RIGHT TO PRIVATE LIFE  
IN THE FRAMEWORK OF THE GATHERING OF INFORMATION  
BY THE TAX AUTHORITIES



Sylvie De Raedt



## GENERAL OVERVIEW

- Inspiration for the research
- Relevancy of the research
- Delimitation of the research object
- Methodology
- Main findings
- Conclusions

# INSPIRATION FOR THE RESEARCH

- General increase of possibilities for the tax authorities to gather information
  - Legal level (e.g. bank investigations)
  - Technological level (e.g. availability of digital data (e.g. location data))
- Increase of possibilities to gather information has opened the debate on the extent of the right to private life in the past (e.g. use of mainframes in the '70)

# RELEVANCY OF THE RESEARCH

- For the tax payer: legal protection
- For the tax authorities:
  - Research on the extent of the right to private life leads to several recommendations for amending the existing legal framework
  - Can a more privacy friendly legal framework encourage the tax payer to be more compliant?

# DELIMITATION OF THE RESEARCH OBJECT

- Increased possibilities to exchange information in the last decade required a delimitation of the research object:
  - Only gathering of information (not forwarding of information)
  - Only gathering of information for income tax purposes
  - Only the most important or privacy relevant data flows
  - Data flows were classified by the source of data:
    - The tax payer
    - The third parties (not public authorities)
    - The public authorities (only the Belgian public authorities - on the extent of the right to private life in the framework of international exchange of information a lot of research has been done already + several opinions and recommendations of national en international advisory organs on privacy (EDPS, Working Party 29, T-PD)

# METHODOLOGY

- Historical study on the right to private life:
  - Clarifies the relationship between the right to private life as a fundamental right and the right to data protection
  - Clarifies the basic principles of both rights
- Right to private life as a fundamental right:
  - Article 8 ECHR = main legal basis
  - Vague: Interference in private life by public authorities is forbidden unless:
    - There is a legal basis for the interference (condition of legality)
    - The interference has a legitimate aim (condition of legitimacy)
    - The interference is necessary for the fulfilment of this legitimate aim (condition of necessity)
  - Study of the decisions of the ECtHR, ECJ and the Belgian Constitutional Court to identify some clear guidelines for the interpretation of those vague principles in the context of information gathering by authorities

# METHODOLOGY

- Right to the protection of personal data
  - Directive 95/46, Belgian Data Processing Law, Regulation 2016/679 (GDPR) (comes into place as of 25 May 2018)
  - Set of (more) clear rights for the data subject and obligations for the processor and controller of data
  - Studied in the context of data processing by a public authority
  - Case law of ECJ, opinions and recommendations of national and international advisory organs on privacy (EDPS, WP 29, T-PD)

# METHODOLOGY

- Result of the study = guidelines in the framework of gathering of information by public authorities to have a clear comprehension of:
- Regarding the right to private life as a fundamental right:
  - 1. Whether and when is there an interference in private life
  - 2. The condition of the legal basis:
    - (a) Legal basis has to be present
    - (b) Legal basis has to be foreseeable
      - Purpose: data subject has to be able to regulate his conduct + safeguard against arbitrary interference
    - If the legal basis is not foreseeable: are there procedural safeguards against abuse?
  - 3. The condition of legitimacy (always met in the framework of this research)
  - 4. The condition of necessity
    - is the interference strictly necessary ? Criterion of subsidiarity
    - Is the interference proportionate?



# METHODOLOGY

## ■ Regarding the right to data protection:

- 5. Whether there is processing of personal data?
- 6. Whether the processing is legitimate?
  - In the framework of the research: this is mostly the case: processing is legitimate when processing is necessary for compliance with a legal obligation or when necessary for public interest
- 7. The condition of data quality: personal data must be:
  - Collected only for specified, explicit and legitimate purposes (principle of purpose limitation)
  - Adequate, relevant and not excessive for those purposes (principle of proportionality)
  - Processed fairly and in a transparent way: specific transparency rights of the data subject:
    - The controller must inform the data subject
    - Right of access to data

- These guidelines are used to assess different means of collection information (tax payer, third parties, public authorities)

# MAIN FINDINGS

- (1) Is there an interference in private life?
  - For natural persons: mostly yes
    - Information on private and professional life is protected by article 8 ECHR (e.g. information on income and assets), without reservation
  - For legal persons: yes, when the legal person is “comparable” with the natural person or when the measure touches communication or trade secrets or in case of searches in business premises
  - Importance of this finding:
    - Conditions of article 8 ECHR have to be met
    - Legal protection

# MAIN FINDINGS

- Importance for legal protection
  - Proposition: legal protection is stronger whenever information is gathered by infringing the right to private life as opposed to other irregularities
  - Belgium:
    - criminal cases: so-called Antigoon-doctrine: unlawfully obtained evidence is not always excluded (only if the acceptance would infringe the right to fair trial)
    - tax matters: decision 22 May 2015 of the Belgian Supreme Court: evaluation of unlawfully obtained evidence by making use of the principles of good governance (inspired by Dutch case law), application in the Netherlands: using evidence that is obtained by an authority that infringes a fundamental right is never good governance

# MAIN FINDINGS

- (2) The condition of the legal basis
  - (a) Legal basis has to be present (decision of the parliament - article 22 Belgian Constitution)
    - Condition mostly met
    - Exceptions: e.g.: observations
      - Whenever an observation constitutes an interference with private life (to be taken into account: systematic character, reasonable privacy expectations, context of the observation: nature of the information being gathered & technical means of the observation)
      - Observations of e.g. the internet by the BISC (Belgian Internet Service Center) seem to constitute an interference -> no legal basis
      - Exception: Observation of the work place as a preparation of a search of the work place: legal basis of searches (article 319 Income Tax Code) is a foreseeable legal basis

# MAIN FINDINGS

- (b) Legal basis has to be foreseeable
  - Purpose: data subject has to be able to regulate his conduct + safeguard against arbitrary interference = limitation of the discretion conferred to the tax authorities
  - Several laws seem problematic
  - E.g.(1) article 319 Income Tax Code (searches of residences and work places): insufficient limitation:
    - searches are not always necessary for an effective tax audit, although more invasive than book investigations or inquiries for information

# MAIN FINDINGS

- E.g.(2) article 335 section 1 Income Tax Code
  - Allows free circulation of information within the Ministry of Finance
  - Allows reuse of information that the receiving administration could never have gathered using his own investigative powers (e.g. reuse of information gathered by Customs and Excises for income tax purposes): is the law unsufficiently limited? Is this kind of reuse strictly necessary?
  - Connection with data protection law: incompatible reuse is forbidden (purposes of reuse are incompatible with the purposes of collection), unless allowed by an explicit law and insofar as strictly necessary
  - Conclusion: reuse of this information should be object of a democratic debate
  - Same conclusion for the reuse of information from other public authorities or from judicial authorities

# MAIN FINDINGS

- (3) The condition of legitimacy (always met)
- (4) The condition of necessity
  - Difference between data collection for the calculation of taxes and data collection that might be useful for tax audit
  - Reasoning decision DIGITAL RIGHTS IRELAND (ECJ, C-293/12 and C-594/12)
  - Especially when information is gathered in an automatic and systematic way: filtering will be necessary to restrict the collection to what is necessary for the specific purpose
  - E.g. gathering information of payment service providers: restrict the information to what is strictly necessary for tax audit – no gathering of information if there is no link with possible infraction on tax legislation
  - This condition will strengthen the condition of relevancy in most laws

# MAIN FINDINGS

- (5) *Is there processing of personal data?*
  - Mostly yes
  - Even when gathering information for taxation of legal persons (e.g. names of director, employees, ...)
- (6) *Condition of legitimacy*
  - Mostly met (see before)



# MAIN FINDINGS

## ■ (7) Condition of data quality

### ■ Purpose limitation / proportionality

- Purpose should be more specific than the “economic well being of the state” or “taxation”
- Explicit and specific purpose allow to assess other principles such as proportionality / storage limitation
- Processing of personal data might be proportionate for income tax purposes but not proportionate for other taxes

### ■ Transparency

- Right for the data subject to be informed
  - Especially when data are collected from the data subject (tax declaration – tax audit of the tax payer)
  - If not collected from the data subject: data protection law allows broad exceptions (less broad when the GDPR will come into place)
  - E.g. Information on recipients, explicit purpose, ...

# MAIN FINDING

- Right to access of data
  - Access to personal data + other information (such as the recipients and sources)
  - Has been limited by the Law 3 August 2012 in case and during a tax audit or the preparation of a tax audit if the access could be harmful for the tax audit
  - An exception to the right to access of data is allowed if there is a clear legal basis for the exception and if the exception is necessary and proportionate for legitimate purposes (article 13 Directive 95/46, article 23 GDPR)
  - A limitation of the right to access of personal data during tax audit seems irrelevant if there is *no specific* reason to assume that the access would harm the tax audit
  - If there is no specific reason to assume this: access will still be possible for most information (Public Access Act)(see case law of the Belgian Raad van State (Highest Administrative Court))

# CONCLUSIONS

- Gathering information by the tax authorities is mostly an interference with private life and concerns mostly processing of personal data
- Legal framework lacks foreseeability, especially old legislation (e.g. investigative powers – Law of 1938 and 1962) as opposed to more recent legislation (e.g. bank investigation – law 2011)
- Condition of necessity strengthens the condition of relevancy in most laws
- Gathering information by infringing the right to private life enjoys stronger legal protection
- Information gathered by the tax authorities lacks transparency, especially when information is gathered from the the data subject